Uvarajah & Anor v Penolong Pengarah Buruh, Butterworth & Ors

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-28-1991
HARUN HASHIM, MOHAMED AZMI AND EDGAR JOSEPH JR SCJJ
15 MAY 1992

Labour Law *— Jurisdiction — Claim for overtime wages — Claim made pursuant to collective agreement — Collective agreement taken cognizance of by Industrial Court — Whether Director General of Labour had jurisdiction to hear and determine claim — Exclusion of Director General's powers vis-a-vis Industrial Court — Employment Act 1955 ss 69(1) & 69A — Industrial Relations Act 1967 ss 17, 33 & 56*

In this case the appellants had filed complaints with the Labour Office at Butterworth that they had not been paid wages for overtime work over a certain period of time. The senior labour officer who conducted the inquiry decided to cancel the hearing having found, relying on the decision of the High Court in *Securicor Malaysia Sdn Bhd v Mohd Lazi bin Katan*,[1] that he had no jurisdiction to hear the claims. The appellants applied to the High Court at Penang for an order of certiorari to quash the decision of the labour officer and a mandamus directing him to hear their claims but this was dismissed (see [1992] 1 MLJ 681). The appellants appealed. The main issue in the appeal was whether the Director General of Labour had jurisdiction under s 69 of the Employment Act 1955 to inquire into and decide any dispute between an employee and his employer in respect of wages or any other payments in cash due to such employee where the terms of employment are governed by a collective agreement which has been taken cognizance of by the Industrial Court.

Held, allowing the appeal:

(1) In a dispute under s 69(1) of the Employment Act 1955, a distinction must be made between a contract of service and terms of employment. The former is an agreement between an individual employee and his employer as defined in s 2 of the Employment Act 1955 while the latter is a separate and distinct agreement which may be expressed in a collective agreement (as in this case), company regulations or implied by law. The right to claim wages arises under the contract of service but how much is to be paid is determined by the collective agreement.

(2) The Industrial Court has the power under s 33 of the Industrial Relations Act 1967 to interpret any collective agreement and the power to order any party to comply with any term of the collective agreement under s 56 of the Act but the jurisdiction so conferred has not been made to the exclusion of any other court or tribunal.

(3) By virtue of s 69A of the Employment Act 1955 the jurisdiction of the Director General of Labour under s 69 had not been excluded merely because the wages of a complaining employee are provided for in a collective agreement. The Director General

under s 69 must necessarily interpret and enforce the terms of the collective agreement when deciding the complaint and making an order thereunder.

(4) What s 69A sought to do was to avoid duplicity of proceedings and by the same token the only exclusion of the Director General's powers under s 69 vis-a-vis the Industrial Court is if the claim or dispute had been referred to or was pending before the Industrial Court.

[Bahasa Malaysia summary

Di dalam kes ini perayu telah membuat aduan dengan Jabatan Buruh di Butterworth bahawa mereka telah tidak dibayar gaji bagi bekerja lebih masa buat tempoh masa tertentu. Pegawai kanan buruh yang menjalankan siasatan itu telah memutuskan untuk membatalkan pembicaraan itu kerana mendapati, bergantung pada keputusan Mahkamah Tinggi di dalam kes *Securicor Malaysia Sdn Bhd v Mohd Lazi bin Katan*[1] bahawa beliau tidak mempunyai bidang kuasa untuk membicarakan tuntutan itu. Perayu telah memohon kepada Mahkamah Tinggi di Pulau Pinang untuk mendapat perintah certiorari membatalkan keputusan pegawai buruh itu dan mandamus mengarahkannya untuk membicarakan tuntutan mereka tetapi permohonan itu telah ditolak (lihat [1992] 1 MLJ 681). Perayu telah membuat rayuan. Isu utama di dalam rayuan itu ialah sama ada Ketua Pengarah Buruh mempunyai bidang kuasa di bawah s 69 Akta Pekerjaan 1955 untuk menyiasat dan memutuskan sebarang pertikaian antara pekerja dan majikannya mengenai gaji atau pembayaran yang lain dengan wang tunai yang kena dibayar kepada pekerja itu di mana terma pekerjaan ditentukan oleh perjanjian kolektif yang telah diberi kognisans oleh Mahkamah Perusahaan.

Diputuskan, membenarkan rayuan itu:

(1) Dalam sesuatu pertikaian di bawah s 69(1) Akta Pekerjaan 1955, satu perbezaan harus dibuat antara kontrak perkhidmatan dan terma pekerjaan. Yang pertama adalah suatu perjanjian antara pekerja individu dan majikannya seperti yang ditakrifkan dalam s 2 Akta Pekerjaan 1955 sementara yang kedua itu adalah suatu perjanjian yang berasingan dan berbeza yang boleh dinyatakan di dalam suatu perjanjian kolektif (seperti di dalam kes ini), peraturan-peraturan syarikat atau tersirat dari segi undang-undang. Hak menuntut gaji timbul di bawah kontrak perkhidmatan tetapi berapa banyak yang patut dibayar ditentukan oleh perjanjian kolektif itu.

(2) Mahkamah Perusahaan berkuasa di bawah s 33 Akta Perhubungan Perusahaan 1967 untuk mentafsirkan sebarang perjanjian kolektif dan berkuasa memerintahkan pihak mana pun mematuhi sebarang terma perjanjian kolektif itu di bawah s 56 Akta itu tetapi bidang kuasa yang diberikan sebegitu tidak dijadikan sehingga mengetepikan sebarang mahkamah lain atau tribunal.

(3) Mengikut s 69A Akta Pekerjaan 1955 bidang kuasa Ketua Pengarah Buruh di bawah s 69 tidak diketepikan hanya kerana

gaji seseorang pekerja yang mengadu dibenarkan di dalam sesuatu perjanjian kolektif. Ketua Pengarah itu di bawah s 69 semestinya mentafsir dan menguatkuasa terma perjanjian kolektif itu apabila memutuskan pengaduan itu dan membuat suatu perintah di bawahnya.

(4) Apa yang s 69A cuba membuat adalah untuk mengelak daripada kependuaan prosiding dan dengan sebab yang sama pengetepian yang tunggal kuasa Ketua Pengarah di bawah s 69 berbanding dengan Mahkamah Perusahaan adalah jika tuntutan atau pertikaian itu telah dirujuk kepada atau masih menunggu keputusan Mahkamah Perusahaan.]

Cases referred to

1 *Securicor Malaysia Sdn Bhd v Mohd Lazi bin Katan* [1989] 3 MLJ 243 (overd)
2 *Nylex (M) Sdn Bhd v Alias bin Chek* [1985] 1 CLJ 185 (not folld)
3 *Rajaretnam a/l Palaniandy v Amalgamated Properties and Industries* [1988] 2 MLJ 363 (not folld)
4 *Asia Motor Co (KL) Sdn Bhd v Ram Raj & Anor* [1985] 2 MLJ 202 (refd)

Legislation referred to

Employment Act 1955 ss 3(3), 14, 69(1), (3), 69A
Industrial Relations Act 1967 ss 17, 33, 56

Appeal from: Originating Motion No 25–6–1990 (High Court, Penang)

Mohideen Abdul Kader (*Mohideen & Asamaley*) for the appellants.

Lim Heng Seng (Senior Federal Counsel) and *Pretam Singh* (Federal Counsel) for the first respondent.

TM Varughese (*TM Varughese & Co*) for the second and third respondents.

Harun Hashim SCJ (delivering the grounds of judgment of the court): On 6 October 1986 Uvarajah a/l Kanasevan @ Kanagasabai and 40 other employees of Palmex Industries Sdn Bhd filed a complaint with the Labour Office at Butterworth that they had not been paid wages for overtime work from 1 January 1980 to 30 June 1986 amounting to $86,154.85 (Labour Case KB 219/86).

On 12 December 1987 Raja Azman bin Raja Mohd and 41 other employees of Palmco Oil Mill Sdn Bhd filed a complaint with the Labour Office at Butterworth that they had not been paid wages for overtime work from 1 January 1980 to 30 June 1986 amounting to $108,838.65 (Labour Case KB 222/87).

A senior labour officer proceeded to conduct the inquiry under s 69 of the Employment Act 1955 ('the Act') in Case KB 219/86 on 27 November 1986 and in Case KB 222/87 on 28 April 1988. With the consent of the parties, the two cases were consolidated and heard together on 14 June 1988. By 21 February 1989 the senior labour officer had heard all the

evidence and part of the submissions of counsel. He adjourned it for continuation on 5 October 1989. By letter dated 21 August 1989 addressed to the solicitors of both parties, the senior labour officer said he was cancelling the hearing of both cases with effect from the date of the letter and requested the parties to take the complaints to the Industrial Court, if the parties so desired. He said he made this decision based on the decision of the High Court at Johore Bahru in *Securicor Malaysia Sdn Bhd v Mohd Lazi bin Katan.*[1] The complainants being dissatisfied with the decision of the senior labour officer applied to the High Court at Penang for an order of certiorari to remove to that court for the said decision to be quashed and for an order of mandamus to direct the senior labour officer to hear and determine the two labour cases. The learned judicial commissioner dismissed the application with costs. [See [1992] 1 MLJ 681.] Hence this appeal.

The main issue in this appeal is whether the Director General of Labour has jurisdiction under s 69 of the Act to inquire into and decide any dispute between an employee and his employer in respect of wages or any other payments in cash due to such employee where the terms of employment are governed by a collective agreement which has been taken cognizance of by the Industrial Court under s 16 of the Industrial Relations Act 1967 and made binding on the employee under s 17(1)(b) of the latter Act.

It is common ground that the employees of the two companies are bound at the material time by the collective agreement entered into between the Food Industry Employees Union and Palmex Industries Sdn Bhd; Palmco Oil Mill Sdn Bhd (including Bulking Installation); Palmco Jaya Sdn Bhd (including Bulk Cargo Terminal) on 15 June 1986 effective from 1 July 1984 and extended to 30 June 1990. The collective agreement provides:

> Article 17 — Overtime
>
> (a) Overtime is work performed at the prior request of the company outside the normal working hours applicable to the employees concerned and with the consent of the employee but such consent shall not be unreasonably withheld.
>
> Article 7 — Arbitration
>
> Any dispute relating to the interpretation or implementation of this agreement shall unless settled by negotiation may be referred for arbitration in accordance with provisions of the Industrial Relations Act 1967 or such other law as may be in force.

It was urged upon us that where the wages and other cash payments of an employee are provided for in a collective agreement, the Director General of Labour has no jurisdiction to inquire into any dispute with respect to such matters under s 69 of the Act. It is said that by virtue of art 7 of the collective agreement read with s 14(2) of the Industrial Relations Act 1967 (arbitration clause) any dispute arising out of a collective agreement should:

(a) be referred for interpretation by the Industrial Court under s 33 of the Industrial Relations Act 1967; or

(b) be the subject matter of a complaint of non-compliance in the Industrial Court under s 56 of the Industrial Relations Act 1967.

The authority for this proposition is said to be the *Securicor Malaysia* case.[1] In that case, the respondent had been dismissed from service without notice for misconduct under s 14 of the Act and was claiming:

(1) wages in lieu of notice of termination of service;
(2) termination benefits; and
(3) arrears of pay for the years 1984 and 1985.

The learned judge there held at p 244 that the labour officer had no jurisdiction to decide on claims (1) and (2) following the case of *Nylex (M) Sdn Bhd v Alias bin Chek*[2] and affirmed by this court in *Rajaretnam a/l Palaniandy v Amalgamated Properties and Industries*[3] where it was held:

> that s 69(1) of the Employment Act 1955 does not give any power to the Director General or Labour Officer of the Ministry of Labour to question the validity of the dismissal of an employee by his employer.

The *Nylex* case[2] was decided on 19 January 1985 and the *Rajaretnam* case[3] on 27 May 1988. In both cases, the issue was whether under s 69(1) of the Act the Director General of Labour has the power to question the validity of the dismissal of an employee by his employer. At that time sub-s (3) of s 69 was in the following terms:

> In addition to the powers conferred by the provision of subsections (1) & (2), the Director General may inquire into and confirm or set aside any decision made by an employer to down-grade or suspend an employee under section 14 and the Director General may make such consequential orders as may be necessary to give effect to his decision.

Section 14(1) states (sub-s (c) prior to 10 February 1989):

> An employer may, on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, after due inquiry —
>
> (a) dismiss without notice the employee; or
> (b) down-grade the employee; or
> (c) suspend him from work without payment of wages for a period not exceeding one week.

It was pointed out in the *Nylex* case,[2] this subsection purposely left out dismissal without notice for misconduct under s 14(1)(a). Following the decisions in these two cases, Parliament amended s 69(3) on 10 February 1989 to read:

> In addition to the powers conferred by subsections (1) and (2), the Director General may inquire into and confirm or set aside any decision made by an employer under section 14(1) and the Director General may make such consequential orders as may be necessary to give effect to his decision:
>
> Provided that if the decision of the employer under section 14(1) is set aside, the consequential order of the Director General against such employer shall be confined to payment of indemnity in lieu of notice and other payments that the employee is entitled to as if no misconduct was committed by the employee:
>
> Provided further that the Director General shall not set aside any decision made by an employer under section 14(1)(c) if such decision has not resulted in

any loss in wages or other payments payable to the employee under his contract of service:

And provided further that the Director General shall not exercise the power conferred by this subsection unless the employee has made a complaint to him under the provisions of this Part within thirty days from the date on which the decision under section 14 is communicated to him either orally or in writing by his employer.

The amendment to s 69(3) has now conferred power on the Director General of Labour to question the validity of a dismissal without notice for misconduct under s 14(1)(a) of an employee by his employer. In view of the amendment by Parliament, *Nylex*[2] and *Rajaretnam*[3] are now academic on this point.

The *Securicor Malaysia* case[1] was decided on 27 April 1989 and it appears to us that the learned judge's attention was not drawn to the amendment as otherwise he would not have held at p 244:

> Following the case of *Nylex (M) Sdn Bhd v Alias bin Chek* and the case of *Rajaretnam a/l Palaniandy v Amalgamated Properties and Industries* I have no hesitation to say that the labour officer has no jurisdiction to decide items one and two but he in fact decided on item three after dismissing items one and two.

With regard to item (3) in respect of the claim for arrears of wages under the collective agreement, the learned judge held at p 245:

> the director in hearing this matter and deciding that the employer was liable to pay under Award No 50 was usurping the function of the Industrial Court for it is clear to me that the respondent in order to claim must come under either s 33 (in respect of interpretation of an Award) or s 56 (complaint of non-compliance with an Award) of the Industrial Relations Act 1967. He would have to go to the Industrial Court for the award he obtained from the labour officer.

He allowed the appeal and set aside the award of the director. The question is whether that is a correct statement of the law. Section 69(1) of the Act provides:

> The Director General may inquire into and decide any dispute between an employee and his employer in respect of wages or any other payments in cash due to such employee under —
>
> (a) any term of the contract of service between such employee and his employer;
> (b) any of the provisions of this Act or any subsidiary legislation made thereunder; or
> (c) the provisions of the Wages Council Act, 1947 or any order made thereunder,
>
> and, in pursuance of such decision, may make an order in the prescribed form for the payment by the employer of such sum of money as he deems just without limitation of the amount thereof.

By s 3(3) of the Act, the power of the Director General may be exercised by —

(a) Deputy Directors General of Labour;
(b) Directors of Labour, Deputy Directors of Labour and Assistant Directors of Labour; and
(c) Labour officers

in so far as inquiries under s 69 are concerned. This court in *Asia Motor (KL) Sdn Bhd v Ram Raj & Anor*[4] held at p 206 that a dispute under s 69(1) of the Act must satisfy three conditions, viz:

(1) that it is a dispute between an employee and his employer;
(2) that it is a dispute to pay wages; and
(3) the dispute arose out of any term in the contract of service between such employee and his employer.

A distinction must be made between a *contract of service* and *terms of employment.*

Section 2 of the Act provides:

> 'contract of service' means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee and includes an apprenticeship contract.

The terms of employment, however, is a separate and distinct agreement which may be expressed in a collective agreement, company regulations or implied by law.

Section 17 of the Industrial Relations Act 1967 provides:

> (1) A collective agreement which has been taken cognizance of by the Court shall be deemed to be an award and shall be binding on —
>
> (a) the parties to the agreement including in any case where a party is a trade union of employers, all members of the trade union to whom the agreement relates and their successors, assignees or transferees; and
> (b) all workmen who are employed or subsequently employed in the undertaking or part of the undertaking to which the agreement relates.
>
> (2) As from such date and for such period as may be specified in the collective agreement it shall be an implied term of the contract between the workmen and employers bound by the agreement that the *rates of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with the agreement* unless varied by a subsequent agreement or a decision of the Court. (Emphasis added.)

CP Mills in his book *Industrial Disputes Law in Malaysia* (2nd Ed) puts it thus at p 55:

> A collective agreement becomes binding on the individual workman only because the terms of the agreement are made implied terms in the *individual contract.*
>
> The collective agreement and the individual contract, as was said in Len Seng 'must and can co-exist' together. However, the rates of wages to be paid and the conditions of employment to be observed under the individual contract 'shall be in accordance with' the collective agreement unless varied by a subsequent collective agreement or decision of the Court.

We are in entire agreement with the comments of the learned author. A contract of service is an agreement between an individual employee and his employer whereas a collective agreement is

> an agreement in writing concluded between an employer or a trade union of employers on the one hand and a trade union of workmen on the other relating

A to the terms and conditions of employment and work of workmen or concerning relations between such parties:

as defined by s 2 of the Industrial Relations Act 1967. The final distinction is this: the right to claim wages arises under the contract of service but how much is to be paid is determined by the collective agreement.

B The Industrial Court has the power under s 33 of the Industrial Relations Act 1967 to interpret any collective agreement; and the power to order any party to comply with any term of a collective agreement under s 56 of the Industrial Relations Act 1967, but the jurisdiction conferred on the Industrial Court under these two sections has not been made to the exclusion of any other court or tribunal. If the legislature had intended it to C be otherwise, it would have said so expressly as it does eg in art 128 of the Federal Constitution: 'The Supreme Court shall, to the exclusion of any other court, have jurisdiction ...'. Again s 69A of the Act provides:

> Notwithstanding section 69, the Director General shall not inquire into, hear, decide or make any order in respect of any claim, dispute or purported dispute D which, in accordance with the Industrial Relations Act 1967 —
>
> (a) has been referred to, or is pending in any proceedings, before, the Industrial Court; or
> (b) is pending in any inquiry or any proceedings under this Act.

which clearly illustrates that the jurisdiction of the Director General of E Labour under s 69 has not been excluded merely because the wages of a complaining employee are provided for in a collective agreement. Indeed, the Director General under s 69 must necessarily interpret and enforce the terms of the collective agreement when deciding on a complaint and making an order thereunder. What s 69A seeks to do is to avoid duplicity of proceedings. By the same token we hold that the only exclusion of the F Director General's powers under s 69 vis-a-vis the Industrial Court is if the claim or dispute has been referred to or is pending before the Industrial Court. It follows that the decision in *Securicor Malaysia*[1] is wrong in law.

In the instant case, the learned judicial commissioner agreed with the decision in *Securicor Malaysia*[1] and followed it. This was the main ground G in his dismissal of the applications for writs of certiorari and mandamus. There are other grounds but we do not think it is necessary in the circumstances of this case to consider them.

For the reasons we have stated, we allowed the appeal with costs against the second and third respondents, set aside the order of the High Court, quashed the order of the labour officer and ordered that Labour Cases KB H 219/86 and KB 222/87 be remitted back to the labour officer for him to complete the inquiry and make a decision according to law. We made no order of costs against the first respondent as the learned senior federal counsel did not support the High Court's finding on the issue of jurisdiction. The deposit to be refunded to the appellants.

I *Appeal allowed.*

Reported by Prof Ahmad Ibrahim